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ABSTRACT

The Bill of Rights contains a set of simple statements about the rights which citizens may claim in disputes with the government. Those who suggest that the First Amendment has always represented a strong commitment to free speech ignore the historical lesson offered by the Sedition Act of 1798. The early American republic maintained careful neutrality between warring France and Britain. Federalists, suspicious of the Republicans' friendship with the French, won congressional passage of the Sedition Act. The statute criminalized criticism of the American government. At that time, the government was in the hands of the pro-British Federalists, while much of the criticism leveled at that party came from certain Republican newspapers and legislators. Federalists defended the Act as necessary to the defense of the United States. The law was expressly designed to suppress any and all political opposition to Federalist leadership and policies. Republican-dominated Southern legislatures bitterly attacked the constitutionality and desirability of the Sedition Act, not for the limits it placed on speech, but for the fact that it increased federal power over the states. The story of the Sedition Act casts serious doubt on the notion that the founding fathers intended the First Amendment to be a libertarian statement designed to protect every speaker and every utterance. The Constitution represents principles which must be applied to the present, irrespective of how they have been interpreted in the past. (Seventy-two footnotes are included.) (SG)

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JUSTIFYING SUPPRESSION: THE SEDITION ACT OF 1798 AS EVIDENCE OF FRAMERS INTENT

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JUSTIFYING SUPPRESSION:
THE SEDITION ACT OF 1798
AS EVIDENCE OF FRAMERS INTENT

The first ten amendments to the United States Constitution are commonly known as the "Bill of Rights." While this grand title sounds impressive, it creates an erroneous impression of the text to which it refers. It suggests that the first ten amendments to the Constitution clearly establish a set of freedoms and privileges guaranteed to all Americans. It suggests that there is a certain permanent quality about these protections; that these rights have a substance that can be touched. Moreover, it implies that the founders of the republic, through the process of amendment, were able to perfect and articulate a shared understanding of "freedom" which is durable enough to transcend time, bridging their age to eternity.

The problems associated with such images are obvious on close reading. The Bill of Rights does not define a set of perfectly understood and inalienable freedoms and privileges. Rather, it is a string of simple statements about rights which citizens may claim in disputes with the government. The actual protection afforded by these rights is vague and elusive, about as certain as a collection of proverbs. Nor were the founders of the republic able to arrive at a shared understanding of freedom. Handlin has observed that "the very circumstances of the adoption of the first ten amendments revealed that this was far from a comprehensive catalogue of rights. The members of the first Congress who framed these sentences did not give much thought to what should be included or excluded; expediency

and caprice played a large part in the ultimate decision."[1] Undoubtedly, most Americans in the late eighteenth century were committed to abstract rights of life, liberty, and happiness; but the specific manifestations of these beliefs were neither defined nor understood from the start. Rather, a shared understanding of what these rights actually mean, insofar as that is possible, developed over the life of this nation. These rights came to have meaning only as they were exercised, challenged, and negotiated.

This evolution is particularly evident with respect to the constitutional protections applicable to free expression. The pertinent guarantees are specified in the First Amendment to the United States Constitution which seem unequivocally and emphatically to proclaim that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[2] In this single compound sentence, the Constitution defines the relationship between the government and the right of the people to criticize their government. Unfortunately, the meaning of the First Amendment is not as obvious as the words make it seem. While they appear eloquent, clear, and straightforward, they are not as transparent as some have suggested.[3] The very simplicity of these words is deceptive, so unequivocal that they have become equivocal, because they create a set of rights so absolute that they

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[1]Oscar Handlin, "Forward," in Leonard W. Levy, Jefferson and Civil Liberties: The Darker Side (New York: Quadrangle, 1973), p. v.

[2]United States Constitution, First Amendment.

[3]See, for example, Alexander Meiklejohn, "The First Amendment is Absolute," The Supreme Court Review, ed. Philip B. Kurland, 1970, p. 247.

must necessarily be limited.[4] Constitutional scholar and jurist Alexander Meiklejohn has noted that "though the intention of the Amendment is sharp and resolute, the sentence which expresses that intention is awkward and ill constructed."[5] Meiklejohn believed that the First Amendment was hard to write and is therefore hard to interpret. The words embody centuries of social passion and intellectual controversy. Meiklejohn claims that "one feels that its writers could not agree, either within themselves or with each other, upon a single formula which would define for them the paradoxical relationship between free men and their legislative agents."[6] The nature and extent of this relationship have developed only after two centuries of trying to understand the First Amendment in a variety of different contexts.

This fact notwithstanding, much of the contemporary literature on freedom of expression argues that there has been a strong commitment to First Amendment freedoms throughout American history. Prevailing historical and legal scholarship generally suggest that First Amendment freedoms have been zealously protected since the founding of this nation. While First Amendment scholars acknowledge that there have been instances and periods in our history in which freedom of speech has been denied, these events are usually described as aberrations and blamed on some unscrupulous individual or group that was obviously out of step with

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[4]See Alexis J. Anderson, "The Formative Period of First Amendment Theory, 1870-1915," The American Journal of Legal History 24 (1980): 56.

[5]Alexander Meiklejohn, "What Does the First Amendment Mean?" University of Chicago Law Review 20 (1953): 463.

[6]Meiklejohn, "What Does the First Amendment Mean?" p. 463.

American traditions, or on unique circumstances that strain even the strongest of convictions.

In this paper, part of a larger research project, I take issue with this claim by arguing that the framers did not possess such a broad commitment to freedom of expression. Specifically, I argue that the Sedition Act of 1798 illustrates a willingness to suppress seditious libel. While seditious libel has been variously defined throughout American history, a common element of all these definitions involves the idea that seditious libel is overly critical of the government. As such, seditious libel is normally considered the subset of speech most worthy of First Amendment protection. Having considered the Sedition Act, I then briefly consider implications for proponents of First Amendment freedoms.

Trouble on the Horizon[7]

Beginning in 1793 with Washington's famous Proclamation of Neutrality, the United States maintained a precarious impartiality in the war between England and Napoleon's France.[8] The situation was difficult because both belligerents had counted Americans as allies in wars against the

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[7]The background sections of this paper were drawn from a paper I presented at the 1989 Eastern Communication Association Convention entitled "Historical Perspective on New York Times v. Sullivan."

[8]This background information has been collected from a variety of sources. Among the best are William Stinchcombe, The XYZ Affair (Westport, Conn.: Greenwood, 1980); Alexander DeConde, The Quasi-War: The Politics and Diplomacy of the Undeclared Naval War with France, 1797-1801 (New York: Scribner's Sons, 1966); Albert Bowman, The Struggle for Neutrality: Franco-American Diplomacy during the Federalist Era (Knoxville: University of Tennessee Press, 1974); Stephen Kurtz, The Presidency of John Adams (Philadelphia: University of Pennsylvania Press, 1957); and Page Smith, John Adams, 2 vols. (Garden City: Doubleday, 1962).

other within the past thirty years. While still British colonies, America had enthusiastically contributed to France's humiliations in the Seven Years' War (1757-1763). And, of course, the French were strong allies of the colonies during the Revolution--indeed, in British eyes, the Revolutionary War was as much a French as a "colonial" victory. While neutrality seemed preferable to siding with either nation, the result was to earn the enmity of both. France and England both suspected that America was in secret alliance with the other.

In response to Jay's Treaty between England and America, the French initiated an aggressive campaign against American shipping. Washington responded by withdrawing pro-French American Ambassador James Monroe and replacing him with the well-known Francophobe, Charles Cotesworth Pinckney. The tension escalated when the French refused to recognize Pinckney, thereby severing diplomatic relations with the United States. By the time news of this diplomatic snub reached the United States, John Adams had replaced Washington as President. Adams responded by calling a special session of Congress. In a speech delivered on 16 May 1797, he urged Congress to prepare for war with France, although he opted to follow Washington's policy of continued negotiations. In an effort to repair the relations with France, Adams sent a mission composed of John Marshall, Eldridge Gerry, and Ambassador Pinckney to Paris to resolve America's problems with France.

The American emissaries arrived in France in September of 1797. Their initial attempt to negotiate with French Foreign Minister Talleyrand was rebuffed. Shortly thereafter, clandestine French agents offered to start negotiations if America would agree to certain preconditions. These preconditions would require the American government to assume financial

responsibility for all claims made by her citizens against France, to finance a sizeable French loan, to apologize publicly for Adam's speech of 16 May, and to give 50,000 pounds to the French Directory as a bribe. Despite considerable pressure from the French, the American envoys refused to meet the conditions without first contacting the President. In a series of coded dispatches to Secretary of State Timothy Pickering, they detailed the French demands. While graphically detailing the French position on negotiations, they concluded by noting that they had promised not to disclose the names of the French agents.

Although written in October of 1797, it took months for the dispatches to reach the United States because few friendly ships risked the Atlantic during the winter. Adams finally received the dispatches on 4 March 1798. He promptly notified Congress that war with France was imminent and called for more defensive measures, and on 23 March, he recalled the American mission to France. Adam's opposition, led by Vice-President Thomas Jefferson, thought his bellicose behavior incredible. They demanded that he give the emissaries' correspondence to Congress. On 3 April 1798, Adams obliged, withholding only the names of the French agents whom he identified as W, X, Y, and Z. The correspondence was soon made public and revelation of this distressing information shocked even those who already had been openly critical of France. The letters dealt a stunning blow to the pro-French faction, which was unprepared for such blatant French venality.[9]

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[9]Jefferson, for example, seems to have convinced himself that no news was good news. His personal correspondence reflects a belief that negotiations would repair relations with France. Dumas Malone, Jefferson and the Ordeal of Liberty, vol. 3 of Jefferson and His Times (Boston: Little, Brown, 1962), p. 394.

The Federalist's Case for Suppression

While a wiser generation might have used this unanimity to heal the nation, the Federalists aggressively exploited this opportunity to solidify their previously precarious hold on the government. The Federalists accomplished this by warning of French treachery while simultaneously launching a direct attack against the political opposition. This was not enough, however, for the Federalists. Although they exploited the events to their political advantage, they lived in desperate fear that their "well-intentioned" efforts would go for naught. The Federalists were particularly troubled by vocal opposition to their policies. They believed that the people were easily misled and could be deceived into betraying the Union. In their minds, republican government could work only if administered by a ruling elite, people wealthy enough to be independent and talented enough to govern wisely and creatively. To the Federalists, the situation was clear and unambiguous. Since they were absolutely convinced that their policies were in the best interests of the nation, they saw any opposition as either misguided or self-serving. In the words of Fisher Ames, "to make a nation free, the crafty must be kept in awe, and the violent in restraint."[10] In the eyes of the Federalists, the Republican press was libeling the government and turning the people against elected leaders. Too much democracy was literally corrupting the people.[11]

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[10]Fisher Ames, "Dangers of American Liberty," in Works of Fisher Ames with a Selection from His Speeches and Correspondence, vol. 2, ed. Seth Ames (1845; reprint, New York: Burt Franklin, 1971), p. 394.

[11]The Federalists fell prey to a sort of "us versus them" mentality which has recurred throughout American history. As Smelser has observed,

These concerns culminated in 1798 with the adoption of four distinct pieces of legislation intended to legislate national unity. The first was a law that increased the period of residence required for an alien to be eligible for citizenship from five to fourteen years.[12] The second was the Alien Friends Act which authorized the President to deport any and all aliens whom he regarded as "dangerous to the peace and safety of the United States."[13] It was a temporary measure that expired two years after its adoption. The third was entitled "An Act Respecting Alien Enemies" and has come to be known as the "Alien Act." It authorized the President to apprehend, restrain, secure, or deport any citizens of countries at war with the United States.[14] As adopted, it was a wartime measure which could be invoked by the President only during a real or threatened invasion or a congressionally declared war. The fourth, and most important of the laws, was the Sedition Act, comprised of four sections.[15] The first of these sections provided a mechanism for punishing any group of people who combined to oppose the law of the United States.[16] The fourth section was a sunset provision which limited the

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"they are different in different ages, being Popish Plotters, the Elders of Zion, Freemasons, Fascist Warmongers, or Creeping Socialists, according to the culture and the dominant impressions in the mind of the persecuted." Marshall Smelser, "The Jacobin Phrenzy: Federalism and the Menace of Liberty, Equality, and Fraternity," The Review of Politics 13 (October 1951): 471-472.

[12]See 1 United States Statutes at Large 566 (1798).

[13]1 United States Statutes at Large 570 (1798).

[14]See 1 United States Statutes at Large 577 (1798).

[15]See 1 United States Statutes at Large 596 (1798).

[16]1 United States Statutes at Large 596 (1798).

duration of the Act until 3 March 1801, the day before the inauguration of the next President of the United States.[17] The second and third sections carry the real force of the Sedition Act. The second section imposed penalties on any person that "shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing . . . (of) any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute."[18] Those found guilty of violating this mandate were to be "punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years."[19] The third section outlined the rights of any individual tried under the second section of the Sedition Act. It stipulated that any person prosecuted under this act for the writing or publishing of any libel aforesaid, would be allowed to use "the truth of the matter contained in the publication charged" as a defense.[20] The jury impaneled to hear the case would have the "right to determine the law and the fact" under the direction of the court.[21] Under the Act, suggests Stevens,

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[17]This section states "that this act shall continue to be in force until March 3, 1801, and no longer." 1 United States Statutes at Large 596 (1798).

[18]1 United States Statutes at Large 596 (1798).

[19]1 United States Statutes at Large 596 (1798).

[20]1 United States Statutes at Large 596 (1798).

[21]1 United States Statutes at Large 596 (1798).

"a political party, a petitioner, or even a legislator who voted 'wrong' might have been fined and imprisoned."[22] It quite literally allowed the Federalists to prosecute all political dissent as criminal action.

The Federalists' justification for such expression, as set forth by Representatives John Allen, Samuel Dana, and Robert Goodloe Harper in the congressional debates, was straightforward. John Allen of Connecticut began from the premise that "if ever it was a nation which requires a law of this kind, it is this."[23] In his mind, the problem was that "certain papers printed in this city and elsewhere . . . exist to overturn and ruin the Government by publishing the most shameless falsehoods against the Representatives of the people of all denominations."[24] Such publications were obviously against "genuine liberty" and the "welfare of the country," and therefore they ought "to be displaced."[25] It is important to remember that Allen is not alleging

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[22]John D. Stevens, "Congressional History of the 1798 Sedition Law," Journalism Quarterly 43 (Summer 1966): 247; and John C. Miller, Crisis in Freedom: The Alien and Sedition Acts (Boston: Little, Brown, 1951), p. 75. Such judgments, of course, do not consider the speech and debate clause of the Constitution. See United States Constitution, Article I, Section 6, Clause 1 which states:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[23]Allen, Annals of Congress, 5 July 1798, p. 2094.

[24]Allen, pp. 2093-2094.

[25]Allen, p. 2094.

actual lies or misstatements, but rather he is complaining about "political" lies. By his reasoning, anyone who has the audacity to question the wisdom of the Federalists' policies is contradicting the truth and is therefore lying. This is apparent when one considers the type of evidence that Allen offers to prove his charges. He refers to a paragraph from the Aurora of 28 June 1798 which states: "It is a curious fact, America is making war with France for not treating, at the very moment the Minister for Foreign Affairs fixes upon the very day for opening a negotiation with Mr. Gerry."[26] This was objectionable, Allen charged, for it gave the impression that the Federalists were warmongers. He cites a section from the Time Piece of New York calling Adams "a person without patriotism, without philosophy, without a taste for the fine arts, building his pretensions on a gross and indigested compilation of statutes and precedents."[27] He indicts another Republican newspaper, the Aurora, for questioning "whether there is more safety and liberty to be enjoyed at Constantinople or Philadelphia."[28] Allen is not arguing that these statements should be suppressed because they are false from an objective criteria, rather he is arguing that their "intention is to swell the ranks of our foes."[29] He admits as much when he claims that the Republicans are using the press as a weapon against the Federalists and that the Federalists must "wrest it from them."[30]

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[26]Allen, p. 2094.

[27]Allen, p. 2097.

[28]Allen, p. 2096.

[29]Allen, p. 2099.

[30]Allen, p. 2098.

Robert Goodloe Harper offers a different justification for the Sedition Act. He was not so much concerned about the press as he was about Republican legislators. In his mind, the real danger was from a speaker "whose character and connexions gave him weight with the people, pronouncing an invective against the Government, and calling upon the people to rise against the law."[31] Such speech "may have a very different effect from the filthy streams of certain newspapers" as it may actually "gain credit with the community, and produce consequences which all former abuse has failed to do."[32] Nor was such evil confined to speeches given before the Congress. Harper charged that letters questioning national policy had been circulated by prominent Republicans. Since such expression would inevitably lead to terrible consequences, Harper concluded that the government was justified in punishing "treasonable and seditious writings."[33]

Samuel Dana labeled those who dared to oppose the Sedition Act as "apostles of insurrection."[34] As he saw the bill it had but two objectives: "to punish conspiracies and calumnies against the Government."[35] That these objectives were commendable could not be denied: hence, opposition to the bill was dismissed on the grounds that it was either misguided of self-serving. Appeals to freedom of speech were erroneous claims, Dana reasoned, as it was

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[31]Harper, Annals of Congress, 5 July 1798, pp. 2102-2103.

[32]Harper, 5 July 1798, p. 2103.

[33]Harper, 5 July 1798, p. 2103.

[34]Samuel Dana, Annals of Congress, 5 July 1798, p. 2112.

[35]Dana, p. 2112.

impossible to understand how free speech could be "anything more than the right of uttering and doing what is not injurious to others."[36] Since seditious speech harmed the government, it was clearly not protected by the Constitution. "Indeed," Dana pondered, "can it, in the nature of the things, be one of the rights of freemen to do injury?"[37] Obviously not, Dana concluded. Even legislators "will not find the ideas of liberty extended to that indefinite latitude which they advocate on this floor."[38]

While other Federalists spoke in favor of the Sedition Act, it is not necessary to chronicle their arguments. Every Federalist who spoke during the Congressional debates defended the desirability of the Sedition Act, although John Marshall privately questioned the constitutionality of the Act.[39] The Federalists defended the Sedition Act as a measure necessary to protect the national interest during a time of crisis. Their understanding of the national interest, however, was synonymous with their own policies. The Sedition Act was intended not to suppress a few dissidents or outcasts, but rather it was expressly designed to suppress any and all political opposition to Federalist leadership and policies. As the arguments offered in defense of the Sedition Act clearly demonstrate, that included criticism offered on the floor of Congress, contained in private letters, and any accounts offered by the press. The Federalists so feared the loss of public support that

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[36]Dana, p. 2112.

[37]Dana, p. 2112.

[38]Dana, p. 2125.

[39]See James Morton Smith, Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties (Ithaca: Cornell University Press, 1966), p. 151.

they lashed out and tried to suppress all speech which might have any tendency of increasing dissatisfaction.

In advocating the adoption of the Sedition Act the Federalists perceived themselves as champions of liberty. At face value, the Federalists believed that the Sedition Act was necessary to protect the republic by preserving the good reputation of the nation's leaders.[40] Moreover, they also believed that the Sedition Act codified a reconceptualization of seditious libel. In defending the Act the Federalists argued that it incorporated many of the procedural protections that colonial publisher John Peter Zenger had attempted to invoke in his defense during his trial for libel in 1735.[41] "A jury is to try the offence," Robert Goodloe Harper proclaimed, "and they must determine, from the evidence and circumstances of the case, first that the publication is false, secondly that it is scandalous, thirdly that it is malicious, and fourthly that it was made with the intent to do some one of the things particularly described in the bill."[42] Should the prosecution fail to sustain any of these points "the man must be acquitted."[43] Barring all else, Harper concluded, "it is expressly provided that he may give the truth of the

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[40]See Alexander Addison, Liberty of Speech and of the Press (Washington, Pa.: Loring Andrews, 1798), p. 20.

[41]See The Trial of John Peter Zenger, 17 Howell's State Trials 675 (1735); Livingston Rutherford, John Peter Zenger, His Press, His Trial and a Bibliography of Zenger Imprints (New York, 1904); Leonard Levy, "Did the Zenger Case Really Matter?" William and Mary Quarterly, 3rd ser., 17 (1960): 35-50; Paul Finkleman, "The Zenger Case: Prototype of a Political Trial," in American Political Trials, ed. Michael Belknap (Westport, Conn.: Greenwood, 1981), pp. 21-42; and Leonard Levy, Freedom of the Press from Zenger to Jefferson (Indianapolis: Bobbs-Merrill, 1966), pp. 43-61.

[42]Harper, Annals of Congress, 10 July 1798, p. 2168.

[43]Harper, 10 July 1798, p. 2168.

concluded, "it is expressly provided that he may give the truth of the publication as a justification."[44] Given the real need for such legislation and procedural protections provided in the Act, Harper concluded the legislative debate by arguing that the bill was "an important means of preserving the Constitution."[45]

The Republicans Respond

The most notable Republican response was a series of resolutions condemning and condoning the Acts.[46] The most famous of these resolutions, covertly authored by James Madison and Thomas Jefferson, were adopted by the outraged legislatures of Kentucky and Virginia. The Kentucky and Virginia Resolutions contained a bitter attack on the constitutionality and the desirability of the Sedition Act. Ironically, Madison and Jefferson kept their involvement in drafting these resolutions secret for fear of being indicted under the very Act that they were protesting.[47] Although Republican strength was rising south of the Potomac, it was not yet strong enough to secure formal expressions of approval in other states for the Kentucky and Virginia Resolutions. The states north of the Potomac, firmly under Federalist control, emphatically denied the resolutions either by

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[44]Harper, 10 July 1798, p. 2168.

[45]Harper, 10 July 1798, p. 2171.

[46]See "The Kentucky and Virginia Resolutions of 1798," in Documents of American History, vol. 1., ed. Henry Steele Commager (New York: Appleton-Century-Crofts, 1958), pp. 178-183.

[47]See Malone, Jefferson and the Ordeal of Liberty, p. 400.

legislative reply or by enacting new state legislation restricting seditious expression.[48]

The Republicans did not object to regulation of seditions libel, but rather they opposed federal action. They had no such objection to state regulation of speech. This distinction is especially evident in the Congressional debates over the Sedition Act. While arguing against federal regulation, for example, Republican Nathaniel Macon strongly supported state regulation. Macon argued that "the states have complete power on the subject, and when Congress legislates, it ought to have confidence in the states."[49] He believed there was ample power in laws under the State Governments; "and though there may not be remedies found for every grievance in the General Government, what it wants of power will be found in the State Governments, and there can be no doubt but that the power will be duly exercised when necessity calls for it."[50] To prove his point, Mr. Macon then proceeded to quote the opinions of the leading members in several of the state conventions in order to show, from the opinions of the friends of the Constitution, "that it was never understood that prosecutions for libels could take place under the General Government; but that they must be carried on in the State courts, as the Constitution gave no power to Congress to pass laws on this subject. Not a single member in any of the

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[48]See Frank Maloy Anderson, "Contemporary Opinions of the Virginia and Kentucky Resolutions," The American Historical Review 5 (1899-1900): 236-237; and James MacGregor Burns, The Vineyard of Liberty (New York: Knopf, 1982), p. 132.

[49]Macon, Annals of Congress, p. 2152 (1798).

[50]Macon, p. 2152 (1798).

conventions gave an opinion to the contrary."[51] There was no objection to state regulation. Everyone, the Republicans included, freely acknowledged the need to punish libel. This was particularly true of seditious libel as the Republicans acknowledged no right to political dissent. Taking precisely this stand, Republican Edward Livingston argued that "there is a remedy of offense of this kind in the laws of every state in the Union."[52] Every man's character is protected by law, he argued, "and every man who shall punish libel on any part of the Government, is liable to punishment. Not . . . by laws which we ourselves have made, but by the laws passed by the several states."[53] The Republican argument objected to the agent of enactment and enforcement, not to the legitimacy of enactment and enforcement. They objected to federal prosecutions, but they did not object to state prosecutions.

Exactly the same argument was developed in the famous Kentucky and Virginia Resolutions of 1798. The Virginia Resolution began with the premise that "the liberty of conscience and of the press cannot be cancelled, abridged, restrained or modified by any authority of the United States."[54] Given that fact, "it would mark a reproachful inconsistency and criminal degeneracy, if an indifference were now shown to the palpable violation of one of the rights thus declared and secured, and to the establishment of a

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[51]Macon, p. 2171 (1798).

[52]Livingston, Annals of Congress, p. 2153 (1798).

[53]Livingston, p. 2153 (1798).

[54]"Virginia Resolution," in Documents of American History, vol. 1, 9th ed., ed. Henry Steele Commager (Englewood Cliffs: Prentice Hall, 1973), p. 182.

precedent which may be fatal to the other."[55] Neither the Virginia nor Kentucky Resolution objected to the substance of the Act; rather, the Resolutions developed a pointed argument against the agent of the law. Even after they had captured control of the government and allowed the Sedition Act to expire, the Republicans asserted a need to regulate seditious expression. In his second inaugural address, for example, Jefferson insisted that "no inference is here intended that the laws provided by States against false and defamatory publications should not be enforced."[56] In fact, Jefferson encouraged a number of prosecutions at the state level against Federalist reporters.

The Sedition Act Prosecutions

When it was apparent that the Virginia and Kentucky Resolutions could not rally enough opposition to nullify the Sedition Act, the Federalists began prosecuting their political opponents. While only a few cases were actually brought under the Sedition Act, a review of some of these cases is useful in understanding how the Federalists conceived of the Act. The first Republican indicted under the Sedition Act was Congressman Matthew Lyon of Vermont. One of a handful of Republicans from New England, Lyon was doubly offensive to the Federalists because of his Irish birth. Lyon's repeated attacks on the Adams' administration made him precisely the type of critic that the Federalists sought to suppress. Lyon was formally indicted on 5 October 1798 for publishing an article denouncing President Adams and for

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[55]"Virginia Resolution," p. 182.

[56]Thomas Jefferson, "Second Inaugural Address," in Thomas Jefferson: Writings, ed. Merrill D. Peterson (New York: Library of America, 1984), p. 522.

printing a letter from Joel Barlow that treated Adams with more "servility than ever George III experienced from either House of Parliament."[57] If one looks beyond the language of the indictment, it becomes apparent that Lyon was charged with nothing more than expressing opinions critical of Adams and his Federalist administration.

Nor was the Federalists' effort to silence Lyon through the Sedition Act an isolated episode. In neighboring Massachusetts, the Federalists used the Sedition Act to reach both national and local figures. The Boston Independent Chronicle, edited by Thomas Adams, was the leading Republican journal in New England, second in national circulation only to Bache's Aurora. While he did show some sympathy to John Adams early in his presidency, Thomas Adams advocated a diplomatic and not a military policy toward France. On several occasions he went so far as to question the President's salary and expense account. When he had the audacity to attack the Sedition Act itself, the Federalists used the Act to indict him in October of 1798 for "sundry libellous and seditious publications."[58] He was released on bail and ordered to stand trial in June of 1799. Like Bache and Burk, Thomas Adams continued his aggressive criticism of the Federalists. When the Massachusetts legislature rejected the Virginia Resolution condemning the Alien and Sedition Acts, Thomas Adams charged the legislators with violating their oaths of office. This attack led to a February 1799 indictment by the state against Adams and his brother and bookkeeper, Abijah Adams, under the English common law. While all this was happening, Adams' health began to deteriorate. In May he was certified as too ill to stand trial, he

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[57]United States v. Lyon, Wharton's State Trials 333, 334 (1798).

[58]See James Morton Smith, p. 252.

was forced to sell the Chronicle, and one week later he died, cheating the Federalists out of the opportunity to prosecute another leading Republican publisher.[59] But, not to be denied successful use of the Act, the Federalists were able to invoke the Sedition Act against two innocuous Republicans for erecting a liberty pole in Dedham, Massachusetts. After destroying the pole, the Federalists arrested Benjamin Fairbanks who had purportedly helped erect the pole. During questioning Fairbank's implicated David Brown for constructing the pole. At their trial, Fairbank's confessed his misdeeds, publicly repented for his action, and begged for the court's indulgence. Acknowledging that he was a good fellow who had fallen in with a bad crowd, Judge Chase imposed a five dollar plus court costs fine and six hours of imprisonment. Brown, on the other hand, defended his actions and denounced the Federalists for repressing the people. For his involvement, Chase sentenced Brown to eighteen months in prison and imposed a $400 fine. At the completion of the eighteen months, Brown was destitute and unable to pay the fine and therefore he remained in jail for two more months.[60]

While the aforementioned examples reveal a great deal about the Federalists' understanding of the Sedition Act, the election campaign of 1800 conclusively proves that the Federalists understood the Act as a viable means

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[59]This account of Adam's prosecution is taken from James Morton Smith, pp. 247-257; Miller, pp. 120-123; and Levy, Legacy of Suppression, pp. 209-211.

[60]This account of the prosecution against Fairbanks and Brown is taken from Frank Maloy Anderson, "The Enforcement of the Alien and Sedition Laws," Annual Report of the American Historical Association for the Year 1912, pp. 121-125; James Morton Smith, pp. 257-270; and Miller, pp. 114-120.

to eliminate political dissent. As the presidential election drew near, the Federalists launched a vicious campaign to squelch political dissent. The indictments brought constitute a "Who's Who" of Republican spokesmen: William Duane, who succeeded Benjamin Franklin Bache as editor of the Philadelphia Aurora;[61] Thomas Cooper, editor of the Sunbury and Northumberland Gazette, political pamphleteer, and staunch ally of Duane;[62] James Callender, occasional editor of the Aurora, writer for the Richmond Examiner, and author of The Prospect Before Us;[63] Anthony Haswell, staunch supporter of Representative Matthew Lyon and editor of the Vermont Gazette, one of the few Republican papers in Vermont;[64] and Charles Holt, editor of the New London Bee, the most active Republican journal in predominantly Federalist Connecticut.[65] Each of these prominent Republican editors was indicted under the Sedition Act for criticizing President Adams, prominent Federalists such as Alexander Hamilton, or

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[61]See United States v. Duane, Wharton's State Trials 348 (1798); James Morton Smith, pp. 277-306; and Miller, pp. 195-201.

[62]See United States v. Cooper, Wharton's State Trials 659 (1800); Dumas Malone, The Public Life of Thomas Cooper, 1793-1839 (New Haven: Yale University Press, 1926); James Morton Smith, pp. 307-333; and Miller, pp. 202-210.

[63]See United States v. Callender, Wharton's State Trials 668 (1800); Trevor Hill, Decisive Battles of the Law (New York: Harper & Brothers, 1906), 1-26; Claude G. Bowers, "Jefferson and Civil Liberties," Atlantic Monthly 191 (January 1953): 52-58; James Morton Smith, pp. 334-358; and Miller, pp. 210-220.

[64]See United States v. Haswell, Wharton's State Trials 684 (1800); John Spargo, Anthony Haswell, Printer--Patriot--Balladeer (Rutland, Vt.: Tuttle, 1925); James Morton Smith, pp. 359-373; and Miller, pp. 122-126.

[65]See James Morton Smith, pp. 373-384; and Miller, pp. 126-130.

Federalist policies. The trials followed precisely the same pattern: prominent Federalists called on Secretary of State Pickering to investigate a specific publication; the Federalists indicted the defendant under the Sedition Act for libeling the government; the prosecution claimed that the defendants must conclusively prove the truth of every statement which the defendant had made; the defendants' access to counsel and specific defenses was restricted; the judge's instruction to the jury eliminated the possibility of acquittal; the defendants were found guilty, fined, and sentenced to prison terms. Each of these prosecutions graphically demonstrates the Federalists willingness to use the Sedition Act to reach political dissent.

A close examination of these trials also reveals that the procedural safeguards provided by the Sedition Act were less than useless to defendants. As elucidated by the proponents of the Sedition Act at the time of adoption, these protections included a requirement that the government establish the defendant's bad intent, a provision stating that truth was an absolute defense against libel, and a formal guarantee to a trial by jury. The intent requirement was moot because the prosecution presumed bad intent from the bad tendency of the words. Since the words might lead to evil, the prosecution argued, it was evident that the speaker had intended to undermine public confidence in the government. The truth defense was ineffective because the courts reversed the presumption. Instead of the government's having to prove that the accused had libeled the government, the defendant had to prove the truth of all expression. This is a classic example of what James Morton Smith calls "presumptive guilt"; the "courts presumed the defendant guilty until he proved himself innocent."[66] The check against

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[66]James Morton Smith, p. 421.

abuse provided by the jury was also hollow. The jury was chosen by the federal marshall, who was appointed by the Federalists. Worse yet, judges generally charged the jury with nothing more than determining whether the defendant had actually uttered or published the words. The judge retained the right to determine intent and truthfulness. This meant that while defendants had a right to a jury trial, the jury had almost no voice in deciding a case. Without these procedural safeguards the Sedition Act was nothing more than the English common law, under which the individual was only protected from prior restraint with any expression being to post facto punishment.

It is evident, from both the legislative debates and their use of the common law and the Sedition Act to prosecute any critical commentary, that the Federalists feared any and all political opposition. This fear was grounded in the delusion that they alone were wise enough to govern. Although they constituted the ruling majority at the time, they feared that they would soon be chased from power by an unholy alliance of Jacobins, immigrants, and misfits who were ill-prepared to rule the nation. The Federalists were desperately afraid of a tyranny of the majority. They feared that the Republicans might use the press to turn the people against them, so they lashed out and suppressed seditious speech.

While one may question the wisdom of the Federalists' conception of government, it is impossible to question the sincerity of their beliefs. Many of the same men who had founded the republic and authored the Constitution and the Bill of Rights felt a real need to regulate seditious speech. They saw little value to public debate, as any wise man could deduce that the Federalists' policies were correct. Further debate would only cloud the issues. Moreover, such critical discussion jeopardized public confidence in the

government and risked disaffection toward national leaders. That they truly believed speech should be limited can be seen in their unanimous support of the Sedition Act. Even after their disastrous defeat in the election of 1800, they continued to stress the importance of controlling criticism of the government. The Sedition Act was never formally repealed; a sunset clause in the Act revoked the Act one day before the inauguration of President Jefferson, who did not seek its extension.[67]

Conclusions

The Sedition Act is a difficult event for proponents of freedom of expression. It suggests, more than anything else, that the First Amendment was not intended as a libertarian statement designed to protect every speaker and every utterance. The colonial experience reveals that the framers had something very different in mind when they drafted the First Amendment. Rather than dwelling on the meaning which they may have intended, we should concentrate on determining a meaning that is relevant to the present time. We should, as Levy argues, avoid the temptation to go "forward while facing backwards."[68] Rather than grounding a commitment to First Amendment freedoms "on the fictitious pretense that they have always existed" with "arguments that are concocted to give to the fiction the appearance of both reality and legality," we should make a positive case for

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[67]See Walter Berns, "Freedom of Press and the Alien and Sedition Laws: A Reappraisal," The Supreme Court Review, ed. Philip B. Kurland, 1970, p. 113.

[68]Levy, Emergence of a Free Press (New York: Oxford University Press, 1985), p. 348.

such freedoms.[69] Such a case would recognize the structure of the media, the nature of our society, and the potential of new technologies. It would be less concerned with what the First Amendment once meant, and more concerned with making it relevant to new situations.

The brilliance of the framers lies not in their view of free speech, but rather in their conception of the Constitution. The Constitution they wrote is not a complex codification of rules and regulations, but rather a set of principles which John Marshall claimed were "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[70] If these principles are to have meaning we must apply them to the present irrespective of how they may have been construed in the past. Writing in 1789, Jefferson eloquently argued that "the earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct."[71] Each generation, according to Jefferson, must create its own conception of the Constitution because the "constitution and the laws of their predecessors extinguished them, in their natural course, with those who gave them meaning."[72]

The strongest case for freedom of expression lies not in histories or legal treatises: rather, it lies in our belief that such freedoms are relevant to our times. While it is intellectually convenient and ideologically comforting

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[69]Levy, Emergence of a Free Press, p. 348.

[70]John Marshall, quoted by James Craig Martin, "Why the Constitution Works?" ABA Journal 73 (September 1987): 80.

[71]Jefferson to James Madison, 6 September 1789, in Thomas Jefferson: Writings, ed. Merrill D. Peterson (New York: Library of America, 1984), p. 80.

[72]Jefferson to Madison, p. 80.

to justify the First Amendment by appeals to the founders, history, or the courts, such appeals confuse reality and illusion. This is not to say, however, that the past is unimportant. Ignoring the past would surely wreak havoc on the present. Meanings that have been ascribed to a constitutional provision cannot help but be a function in part of the intentions of the framers and the intentions of the contemporary interpreters. There is a crucial difference, however, between respect for the past that takes the form of mindless adherence to the supposed intentions of the framers and respect for the past in the form of appreciation for the value of continuity, stability, and tradition.